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BY 

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE EASTERN DISTRICT OF TEXAS  
3 MARSHALL DIVISION

3 MICROUNITY SYSTEMS \* Civil Docket No.  
4 ENGINEERING, INC. \* 2:04-CV-120  
5 VS. \*  
6 \* Marshall, Texas  
7 \*  
8 \* August 4, 2005  
9 \* 2:30 p.M.  
10 DELL, INC., ET AL

8 TRANSCRIPT OF MOTION TO QUASH  
9 BEFORE THE HONORABLE T. JOHN WARD  
10 UNITED STATES DISTRICT JUDGE

11 APPEARANCES:

12  
13 FOR THE PLAINTIFFS: (See sign-in sheet.)  
14

15 FOR THE DEFENDANTS: (See sign-in sheet.)  
16  
17  
18  
19

20 COURT REPORTER: MS. SUSAN SIMMONS, CSR  
21 Official Court Reporter  
22 100 East Houston, Suite 125  
23 Marshall, TX 75670  
24 903/935-3868

25 (Proceedings recorded by mechanical stenography, transcript  
produced on CAT system.)

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P R O C E E D I N G S

THE COURT: All right. Please be seated.

All right. We have got a couple of matters to take up in this MicroUnity Vs. Dell, and the parties had requested and the Court had changed it to meet y'all's request. The one that I have got down first now is the Motion to Quash, I guess, that's Advanced Micro Devices. Have we got the parties here necessary to present that?

MR. KLEIN: Yes, Your Honor.

MR. HEALEY: Yes, Your Honor.

THE COURT: All right. Who is here for the Movant?

MR. KLEIN: Michael Klein, Your Honor, for AMD.

THE COURT: All right. Mr. Healey, you're here for Intel?

MR. HEALEY: Yes, sir.

THE COURT: All right. Both of you ready to proceed?

MR. KLEIN: Yes, sir.

MR. HEALEY: Yes, sir.

MR. CAPSHAW: Calvin Capshaw is here for MicroUnity, Your Honor.

THE COURT: All right. What is your position in this? Other than observing the fight, what are you here for, Mr. Capshaw?

MR. CAPSHAW: Your Honor, we're here on behalf of

1 MicroUnity because we're involved in negotiations with AMD, so  
2 we have an interest in whether those settlement discussions  
3 are part of discovery.

4 THE COURT: Okay. I just thought that maybe you  
5 were going to try to convince me that you were here as a  
6 friend of the Court or something like that? Nothing that  
7 silly, okay, thank you.

8 All right. Counselor, it's your motion, let's hear  
9 it.

10 MR. KLEIN: Your Honor, my name is Michael Klein,  
11 and our arguments on the Motion to Quash are really relatively  
12 simple, Your Honor. AMD, the witnesses who would be  
13 testifying or responding for documents of the subpoena are --  
14 they live, reside or transact business in the Austin area or  
15 some of them may be in Sunnyvale, California. But we can work  
16 that out, that's not the problem.

17 But Rule 45 says that a subpoena for attendance at a  
18 deposition shall issue from the court for the district  
19 designated by the Notice of Deposition at the district in  
20 which the deposition is to be taken.

21 And then further on in Rule 45 under (c)(3)(a), it  
22 says: On timely motion, the court by which a subpoena was  
23 issued shall quash or modify the subpoena if it, number 2,  
24 requires a person who is not a party or an officer of a party  
25 to travel to a place more than 100 miles from the place where

1 that person resides, is employed or regularly transacts  
2 business in person.

3           So, under that rule, Your Honor, what they should  
4 have done was serve the subpoena out of the Austin Division of  
5 the Western District since the AMD individuals reside in the  
6 Austin area. Obviously, the purpose of Rule 45 with regard to  
7 third-party subpoenas is not to unduly burden or inconvenience  
8 these third parties, since they are not parties to the  
9 lawsuit.

10           As we attached to our Motion to Quash, we wrote  
11 letters to the lawyers for Intel explaining to them that those  
12 subpoenas needed to be issued out of the Austin Division of  
13 the Western District because that's where the witnesses  
14 resided, but for some reason Intel decided to issue the  
15 subpoena out of Marshall, serve it on AMD's registered agent,  
16 CT Corporation in Dallas for a deposition to be held in Tyler.  
17 None of those places are within a hundred miles or even a  
18 hundred-and-fifty miles of where the AMD witnesses reside or  
19 regularly transact business.

20           So, we think that pursuant to Rule 45, it's pretty  
21 clear that the subpoena should be quashed. And I might point  
22 out also to the Court that by way of history that the original  
23 subpoena was issued out of the Northern District of  
24 California, and a Motion to Compel on that was filed here in  
25 Marshall. Fortunately, we were able to convince the

1 Plaintiffs that that was improper and they withdrew that  
2 subpoena and also the Motion to Compel. But then they issued  
3 it here out of Marshall, as I mentioned, for the CT  
4 Corporation in Dallas for a deposition in Tyler.

5 So, we think the rule is clear that the subpoena is  
6 improper and as Subsection (3)(a)(2) of Rule 45 provides, it's  
7 mandatory that on timely motion, the subpoena shall be  
8 quashed.

9 THE COURT: Or modified.

10 MR. KLEIN: I'm sorry, Your Honor?

11 THE COURT: Or modified.

12 MR. KLEIN: Or modified. Although with regard to a  
13 distance issue, I'm not sure how it would be modified since  
14 you can't change a distance. If it were a scope issue, you  
15 know, the scope of the subpoena could be modified, but since  
16 it's a distance issue, I just don't see how it could be  
17 modified to change a distance between --

18 THE COURT: Well, if I read Mr. -- if I read Intel's  
19 response, Mr. Healey, what he's saying is that there are other  
20 provisions in that rule that actually says we're operating  
21 with -- under -- effectively what you're saying is that the  
22 distance provided under the state rule is really what  
23 controls, and since your company has elected to appoint an  
24 agent for service of process in the State of Texas, that  
25 that's really where I am, is that I'm looking to Dallas. Is

1 that what your argument is, Mr. Healey? Or did I misstate it.

2 MR. HEALEY: Yes, sir, it's that, and it's also that  
3 in terms of where they want to have the deposition, we'll go  
4 wherever they want to do it. We have told them that from Day  
5 One. So, but technically if you want to get technical, which  
6 we're doing here, we served them correctly under the state  
7 rule, and it's not only their registered agent, but if you go  
8 to their website, they have a sales office in Dallas too. The  
9 person here is AMD, not whoever this unnamed corporate  
10 representative is.

11 THE COURT: Well, you are willing to take it in  
12 Austin, then?

13 MR. HEALEY: Austin, wherever they want to take it,  
14 if they'll just tell us where to show up.

15 THE COURT: Why is it that you say -- you're  
16 effectively saying is that this Court cannot conduct  
17 discovery, is that what you're saying?

18 MR. KLEIN: Me, Your Honor?

19 THE COURT: Yes. I'm saying -- I mean, on behalf of  
20 your client that you are saying that the only way that they  
21 can subpoena your client is through the Western District of  
22 Texas that doesn't know anything about this case.

23 MR. KLEIN: Well, that's what the rule provides,  
24 Your Honor.

25 THE COURT: Well, that's your interpretation of the

1 rule.

2 MR. KLEIN: That's my interpretation of the rule,  
3 correct. And its come up in other cases, Your Honor, one of  
4 which we didn't cite. Well, in fact, in the MicroUnity case  
5 which we cited in response to their Motion to Compel, that  
6 same issue came up where you have different district courts  
7 deciding whether or not various parties -- non-parties rather  
8 had to provide documents in response to a subpoena, and the  
9 court said, that, you know, in appropriate cases what those  
10 courts can do if they have a question about relevancy, they  
11 can refer that matter back to the court where the trial is  
12 pending. But on issues such as whether or not the subpoena  
13 has been served properly, and those kinds of things, it needs  
14 to be served out of the district in which the -- the witness  
15 or respondent deponent resides, and if not, our interpretation  
16 and AMD's interpretation of the rule is that it must be  
17 quashed.

18 THE COURT: All right. Let's hear from you, Mr.  
19 Healey. What's my legal -- he says that I just don't have the  
20 authority under the rules to enforce the subpoena.

21 MR. HEALEY: Well, Your Honor, it's clearly not  
22 correct. First of all, under Rule 45, you can refer to the  
23 state rules, Rule 176.3 of the Texas Rules of Civil Procedure  
24 let us serve their registered agent within 150 miles. Their  
25 registered agent is in Dallas, we did that. AMD also has a



1 sales office in Dallas. The point here though is under --  
2 whether it is under any interpretation of the rule, we have  
3 good service. What they are really doing is looking at a  
4 separate provision of the rule, Rule 45(c)(3) on when a court  
5 can quash a subpoena for undue burden. And they are saying if  
6 it's a hundred miles beyond where the person transacts  
7 business or resides, then the court can quash or modify the  
8 subpoena.

9 Well, the person here is AMD, and it is where AMD  
10 resides, not where this unnamed corporate representative,  
11 whoever he or she is that they haven't given us a name or told  
12 us who it is, whether they live in Austin or Roundrock or  
13 Georgetown, you know, Salado or -- you know, I don't know  
14 where they live or who it is, it is AMD. AMD's registered  
15 agent is in Dallas by their choice, and they have an office in  
16 Dallas. That's -- you know, it's about a hundred miles from  
17 Tyler, if you want to get fussy, but it's certainly within the  
18 150 miles under the Texas Rule under Rule 45 that we're  
19 allowed to use for service. And if it's unduly burdensome, we  
20 have told them from Day One, we'll take the deposition  
21 whenever, wherever, just tell us where it is.

22 We cut back the original subpoena we served from, I  
23 believe, seven or eight categories to four that were carefully  
24 tailored to this lawsuit. And so now what we are dealing with  
25 is four categories carefully tailored to the lawsuit, and the

1 reason we issued the subpoena out of this Court is because  
2 this is a large complicated case, and this Court is presiding  
3 over it, and if there were to be a dispute over the subpoena,  
4 logically this Court should handle it as opposed to a court  
5 that had no knowledge of the case.

6 So, one, under Rule 45 service is proper under  
7 (c)(2). So, the jurisdictional issue is satisfied, period.  
8 And then we go to (c)(3) and see if it is burdensome. It is  
9 not burdensome because if you want to count miles, Tyler is a  
10 hundred miles from Dallas, and that's where they have a sales  
11 office and their registered agent, and AMD is the person not  
12 whoever this unknown corporate rep is. But putting that  
13 aside, we will go wherever they want us to go to do the  
14 deposition or depositions if it's more than one person. They  
15 can just tell us where and when, and we'll show up.

16 And finally, you know, we have got four categories  
17 directly related to the lawsuit, we cut it back. This Court  
18 knows the case, and knows the parties, and there should be no  
19 issue as to whether or not those four categories needs to be  
20 addressed in discovery, and I think they clearly do.

21 So, I think this is a -- you know, a fight over  
22 nothing here or at best it's a fight over some very bizarre  
23 procedural technicalities that I have not been able to find  
24 any court that has chosen to written (sic) on these procedural  
25 technicalities, but I think under a plain reading of the rule,

1 jurisdiction is established and burden is just not an issue  
2 because we will accommodate them however they need to be  
3 accommodated in terms of timing, so long as it is a reasonable  
4 time and location, so long as it is within the United States,  
5 we'll go there.

6 MR. KLEIN: May I have a brief response, Your Honor?

7 THE COURT: Yes, the operative word is brief.

8 MR. KLEIN: Mr. Healey's interpretation of the word  
9 person, I would have to differ with that because (c) (a) (2)  
10 says: It shall be quashed if it requires a person who is not  
11 a party or an officer of a party to travel. So, it doesn't  
12 focus on -- it doesn't use the word person in the sense of a  
13 party, it, in fact, distinguishes between a person and a  
14 party, and a person who is an officer of a party. So, the  
15 rule is clearly intended to not cause undue burden to persons  
16 such as AMD employees in the Austin area who would have to  
17 travel to Tyler for depositions. It matters not from a legal  
18 standpoint whether or not Mr. Healey is agreeable to come to  
19 Austin or anywhere else to take those depositions. It's just  
20 that the rule requires that for someone who is going to give  
21 his deposition, they shouldn't -- the rule doesn't want them  
22 to have to travel more than a hundred miles from where they  
23 reside, employed or regularly transact business. So --

24 THE COURT: All right. The Court's ruling is that  
25 your client has been properly served with a subpoena to

1 produce a witness, okay? I'll give you until Tuesday at 3:00  
2 o'clock to advise the Court if you want to produce that  
3 witness voluntarily at the place in Travis County, Texas,  
4 Dallas County, Texas, or Smith County, Texas; your choice.  
5 Absent a written indication received by this office by my  
6 chambers before that time, the deposition shall proceed in  
7 Smith County, Texas -- was that Ramey and Flock's offices, Mr.  
8 Healey?

9 MR. HEALEY: Yes, sir.

10 THE COURT: At the law firm of Ramey and Flock, 500  
11 Citizens -- it used to be the Citizen's Bank, what is the name  
12 of the bank now over there, Mr. -- oh, that's not -- somebody,  
13 what's the name of the bank building over there. Anybody know  
14 that address?

15 MR. HEALEY: I'm sorry, sir, I'd have to look.

16 COURT REPORTER: Is it Region's?

17 THE COURT: Huh?

18 COURT REPORTER: Is it Regions Bank?

19 THE COURT: I don't know, I can't keep up with -- in  
20 the offices of Ramey and Flock in Tyler, Smith County, Texas.  
21 Are we clear on that? Any question about my ruling?

22 MR. KLEIN: No, Your Honor.

23 THE COURT: All right. Now then, let's take up the  
24 next matter if we can.

25 That takes care of your client, doesn't it? What

1 you had filed?

2 MR. KLEIN: No, Your Honor, because he's also asking  
3 for documents, and we think that a lot of the documents he's  
4 requesting we should not have to produce.

5 THE COURT: Well, I just said that subpoena was  
6 lawfully served on your client and you had to comply with it,  
7 that includes the document request.

8 MR. KLEIN: And we have objections to various of the  
9 requests. I mean, are you saying you are overruling all of  
10 our objections?

11 THE COURT: No, I'm not saying that, I didn't know  
12 that was set for today.

13 MR. KLEIN: I don't think that it was, but we're  
14 ready to argue it if the Court wants to take that up.

15 MR. HEALEY: Your Honor, there's really one issue  
16 and whether the Court wants to take it up today or on another  
17 occasion.

18 THE COURT: Well, I'd rather take it up.

19 MR. HEALEY: Sure.

20 THE COURT: I mean, I don't want to have y'all  
21 travel up here.

22 MR. HEALEY: It's one issue really, and that is,  
23 there are patent license negotiations and other business  
24 negotiations between AMD and MicroUnity from 1999 forward, and  
25 there have been objections by AMD to producing evidence that

1 relates to these patent license negotiations and offers to  
2 license back and forth between these parties.

3 THE COURT: Okay. Now, I do recall -- I thought  
4 that was in -- okay, I didn't have the parties right.

5 MR. HEALEY: Right.

6 THE COURT: Well, what are the facts surrounding  
7 whether or not there was litigation or threatened litigation  
8 during the period of these negotiations?

9 MR. HEALEY: Your Honor, the facts are, as best we  
10 can divine them, and I have got, I think, two pages from the  
11 deposition of Mr. Buckmaster which is the deposition of  
12 MicroUnity's corporate representative, who was their  
13 president, that has been attached to various briefs, if I  
14 could hand it up for the Court's convenience. It is pages 188  
15 and 189.

16 There has never been an active lawsuit or lawsuit of  
17 any kind between AMD and MicroUnity. AMD and MicroUnity say  
18 they started having threats of litigation in 2003, but if you  
19 look at Mr. Buckmaster's testimony starting on page 187 --  
20 188, the bottom quadrant on the miniscript on the second page  
21 that I handed you.

22 THE COURT: Yes, sir.

23 MR. HEALEY: And you read it to page 189, the top  
24 quadrant on the third page, you will see that Mr. Buckmaster  
25 never actually says that there was a threat of litigation

1 until there was a written threat of litigation -- what he  
2 calls a written threat of litigation in April 2004. We  
3 attached that letter to our motion, and even that letter is  
4 not an explicit threat of litigation. It informs AMD of the  
5 filing of the lawsuit against Intel, and encourages AMD to  
6 take license in light of that filing of the lawsuit against  
7 Intel.

8           The bottom line, Judge, is that there are two points  
9 here. In the Soverain case that they rely on out of this  
10 district on the settlement privilege; first of all, the court  
11 held the settlement privilege didn't apply to prior art, and  
12 in that case the court ordered that even prior art from  
13 settlement negotiations had to be produced. And one of our  
14 four document requests is broad prior art. So, putting aside  
15 the settlement privilege doesn't apply to prior art, if they  
16 have prior art they ought to produce it.

17           The second thing, Your Honor, is in the cases they  
18 cite there was all active litigation, and if you say in a  
19 patent infringement lawsuit that a patent license negotiation  
20 is a, quote, settlement negotiation because a patent is  
21 inherently a right to exclude someone from practicing a  
22 invention. Well, you go against the cases we've cited such as  
23 the Papst case, and the Deere case that upheld that patent  
24 license negotiations are business negotiations and not  
25 settlements of claims. And what we're saying here is that at

1 least -- if you -- you know, you should limit the settlement  
2 privilege to an active lawsuit, but if you're going to take it  
3 beyond an active lawsuit, it ought to be to the point where  
4 it's explicitly clear to everyone that there is an actual  
5 threat of litigation. And if you look at Mr. Buckmaster's  
6 deposition, that's not until April of 2004, because otherwise  
7 in every patent case, you could shield patent negotiations  
8 over licenses from discovery by claiming that patents are  
9 nothing more than an ability to sue somebody to stop them from  
10 making your invention or to get royalties from making your  
11 invention, and prevent discovery on all patent license  
12 negotiations. You have either got to have the brightline test  
13 that there is actually a lawsuit or something so explicit that  
14 to anyone it's clear there is a lawsuit, and here we think  
15 that the evidence shows in the form of Mr. Buckmaster's  
16 deposition and the letter we have attached, that the earliest  
17 you can possibly say is that written -- what Mr. Buckmaster  
18 calls the written notice of April 2004. But even so, I think  
19 that given how that the threat that in the -- especially in  
20 the peculiar context of patent license negotiations to expand  
21 the settlement privilege beyond where there has been a lawsuit  
22 to a situation where since 1999 there has never been a  
23 lawsuit. Have these people been negotiating for seven years,  
24 and there has never been a lawsuit? And now they are going to  
25 say that all of a sudden the conversations that they have had



1 in the last year and a half are under settlement privilege? I  
2 think that pushes the settlement privilege beyond the bounds  
3 that courts want to legitimately protect settlement of active  
4 litigation --

5 THE COURT: All right. Prior to April 2004, you  
6 produce them; subsequent to 2004, you produce them in-camera  
7 to the Court for the Court to consider.

8 What type of time frame do you need on that?

9 MR. KLEIN: Does the Court want them in electronic  
10 form or -- we have got them in electronic form.

11 THE COURT: Well, how hard -- you know, I don't want  
12 you to go to great expense, but electronic form is not very  
13 good for the Court, you know.

14 MR. KLEIN: Well, it will take a while to print them  
15 all out. We have got about, I think, six or seven CD roms and  
16 --

17 THE COURT: Since before -- since April 2004?

18 MR. KLEIN: No, most of it is after, I believe, Your  
19 Honor.

20 THE COURT: Well, no, that's what I'm saying,  
21 subsequent to April 2004.

22 MR. KLEIN: We don't have it divided up that way  
23 yet, so I can't tell you exactly, but my sense is that most of  
24 it is after April 2004, and the total universe, both before  
25 and after is one banker's box and then about six or so CD

1   roms. So, what we will have to do is print them out, and I  
2   guess depending on --

3           THE COURT: Well, you can produce -- you can produce  
4   those though that -- prior to April 2004, you are going to  
5   have to print them out anyway, aren't you?

6           MR. KLEIN: Yes, yes.

7           THE COURT: You are going to have to make this  
8   distinction.

9           MR. KLEIN: Yes, I was just saying it was going to  
10   take time to print out the --

11          THE COURT: Well, all I am asking you is how much  
12   time?

13          MR. KLEIN: I would say that we could get it done  
14   within two weeks.

15          THE COURT: How about three weeks? Is that all  
16   right with you, Mr. Healey, would that work out?

17          MR. HEALEY: Yes, sir. So, they will be producing  
18   before April 2004, and you will review in-camera after April  
19   2004.

20          THE COURT: That's correct.

21          MR. HEALEY: And just in terms of the burden on the  
22   Court to review, are you going to review prior art too, or is  
23   the prior art --

24          THE COURT: The prior art, I thought we had -- I  
25   mean, I have ruled on the prior art, I think that needs to be

1 produced.

2 MR. KLEIN: Your Honor, our prior art was developed  
3 by in-house and the attorneys.

4 THE COURT: Well, it may have been developed by  
5 them, but --

6 MR. KLEIN: And they -- it's their work product of  
7 their analysis of various things out there as to whether or  
8 not it is prior art. I mean, they put it together and our  
9 position is that's their work product and that absent some --  
10 I mean, they got it from information out of the public domain,  
11 which Intel could do as well. I mean, all they have to do is  
12 go look for it. Our in-house attorneys have done that,  
13 expended their legal talent doing that, and we shouldn't have  
14 to give that over to Intel just because they got sued in a  
15 patent infringement case.

16 THE COURT: Of course, I don't know what kind of  
17 work you -- what -- let's hear, Mr. Healey, what do you got to  
18 say about that?

19 MR. HEALEY: Well, I think that prior art -- what is  
20 the prior art? A list of patents or the list of publications,  
21 that's not privileged. What they say might say reads on Claim  
22 7 of the '432 patent, that would be.

23 THE COURT: Well, that's what I understood his  
24 objection to was -- I hope it wasn't to --

25 MR. HEALEY: We are not asking -- he can -- I agree

1 that what their internal analysis of what prior art reads on  
2 what claim on what patent is privileged, but the actual  
3 references themselves are not privileged and would be  
4 produced.

5 THE COURT: Counsel, do you understand the  
6 distinction he just made? I'm sure you do, because I think I  
7 do, and if I do, then probably most folks walking down the  
8 street will.

9 MR. KLEIN: I think I do, Your Honor.

10 THE COURT: Well, that's what -- then that's what we  
11 are going to produce is the prior art is identification of  
12 what it is that was considered prior art without the --

13 MR. KLEIN: The analysis.

14 THE COURT: -- the analysis made by your clients  
15 in-house.

16 Three weeks take care of that also? Within this  
17 three weeks?

18 MR. KLEIN: It is starting to get to be -- if we  
19 could get four weeks, Judge, I think that would be better.

20 THE COURT: Any problem with you, Mr. Healey? Where  
21 are we on time?

22 MR. HEALEY: I think our opening expert reports are  
23 due in September, but I guess we could work something out with  
24 MicroUnity or AMD as time gets --

25 THE COURT: Well, I prefer not to try to set

1 everything in stone for you since it's better if y'all got a  
2 little flexibility. So, I will put 30 days.

3 MR. HEALEY: Okay. And if we need to work something  
4 out, I'm sure we can.

5 THE COURT: That's what I say, if a problem arises,  
6 y'all need to address it.

7 MR. KLEIN: One of our other concerns in these  
8 documents, Your Honor, is there are references to a new  
9 product to be developed by AMD, and sometimes those  
10 discussions take place in conjunction with these licensing  
11 discussions, because they are sort of -- they sort of go hand  
12 in hand, and we would like to be able to redact any references  
13 to any new product discussions by AMD, even if it's with  
14 MicroUnity.

15 THE COURT: Well, I -- can you live with that, Mr.  
16 Healey or not, at this point? I need to think about that.

17 MR. HEALEY: Well, I guess, Your Honor, that if --  
18 you know, in general the proposition is something that makes  
19 sense. The only specific problem would be is if there is  
20 something in the documents where they present to MicroUnity a  
21 future product, without getting into all of the details of it,  
22 that says, well, we have this feature, this feature, and this  
23 feature, and MicroUnity admits in the negotiation in their  
24 notes, well, that doesn't infringe. So, you know, so long as  
25 there is not a discussion of whether or not this specific

1 future product has features that would infringe a specific  
2 claim of a MicroUnity patent, I think we could live with that.

3 THE COURT: You -- you can redact it except for  
4 those where there is specific discussions of infringement, and  
5 that will be produced in-camera to the Court.

6 MR. HEALEY: That's fine, Your Honor.

7 THE COURT: What other problems with respect to the  
8 document request?

9 MR. KLEIN: Let me check right quick, but I think  
10 that has got it.

11 THE COURT: Yes, sir.

12 MR. KLEIN: I think that has got it, Your Honor.

13 THE COURT: Anything else that you know of, Mr.  
14 Healey?

15 MR. HEALEY: No, sir, that's it.

16 THE COURT: All right.

17 \* \* \* \* \*

18 THE COURT: Let's move on to our next matter in this  
19 same case.

20 Now, is this your Motion to Compel also as to  
21 Stexar?

22 MR. HEALEY: Yes, sir, Stexar.

23 THE COURT: All right. Who is here for -- who is  
24 going to speak on behalf of Stexar?

25 MR. GONSOULIN: I am, Your Honor, Dewey Gonsoulin of

1 Beaumont.

2 THE COURT: Anybody else? You are the well known  
3 patent lawyer today, Mr. Gonsoulin?

4 MR. GONSOULIN: Judge, what I know about patents,  
5 you could take --

6 THE COURT: That's all right, you don't answer that  
7 question. It is strictly meant in jest to an old friend.

8 All right. Are you ready to proceed, Mr. Gonsoulin?

9 MR. GONSOULIN: We are ready to proceed, Your Honor.

10 THE COURT: All right. Mr. Healey, let's hear it,  
11 it's your motion.

12 MR. HEALEY: Yes, sir. Your Honor, we had served a  
13 subpoena on a company called Stexar Corporation because they  
14 were doing business dealings with MicroUnity. They responded  
15 ultimately after we negotiated the scope of the subpoena with  
16 several pages of documents, many of which were redacted. And  
17 at first those redactions didn't make a whole lot of sense to  
18 us, and we had asked for a log and whatnot and that was never  
19 forthcoming, so ultimately we filed the Motion to Compel.

20 Recently, Mr. Gonsoulin and his firm appeared and  
21 they filed an affidavit from someone at Stexar that --

22 THE COURT: Is this the Calderwood affidavit?

23 MR. HEALEY: Yes. That lays out some of the basics  
24 of the trade secret nature of some of these documents, and we  
25 didn't object to them filing that. Really what I would like

1 to point out to you is some of the things in the documents,  
2 for instance, directly relate to the lawsuit. For example,  
3 one of the documents is a Thursday, March 10, 2005 e-mail,  
4 subject, MicroUnity, from, redacted, to, redacted, cc,  
5 redacted, subject, MicroUnity, redacted; and it refers to  
6 apart from a proposed consulting agreement with Stexar  
7 MicroUnity NDA, and some draft tech and patent license  
8 agreements, I'm afraid that I have no documents, none at all  
9 from MicroUnity. I had requested the technical documents,  
10 etc. Well, here we have somebody who sent an e-mail to  
11 somebody, ccing somebody about MicroUnity regarding technology  
12 and patent licenses from MicroUnity, and we're entitled to  
13 know who this person is and who they are sending it to, and I  
14 have no idea how disclosing that information can be a Stexar  
15 trade secret or why it would hurt Stexar and who has these  
16 draft technology and patent license from MicroUnity and what  
17 they say, is directly relative to this lawsuit. So, that is  
18 one example.

19 There is another example on the same page on the  
20 same day with from, to and certain things blanked out, then it  
21 says, I think that blank has been the gatekeeper and records  
22 keeper. This seems to refer to the patent license and  
23 technology licenses or similar documents and we're entitled to  
24 know who this blank is who is the gatekeeper and records  
25 keeper and who is discussing these documents.



1           If you also look, you will some handwritten notes of  
2 a meeting with MicroUnity that seems to talk about the whole  
3 history of the company, the nature of their inventions and  
4 what they are discussing, and yet -- and it talks about great  
5 anticipation, whatever that is, and yet it is all blanked out.  
6 And this is a meeting between MicroUnity and Stexar. So, how  
7 can these notes of a meeting between MicroUnity and Stexar be  
8 trade secret to Stexar?

9           Again, we're talking about notes that relate to the  
10 history of MicroUnity and what MicroUnity is telling Stexar  
11 about the nature of their inventions and the nature of their  
12 company.

13           So, you know, where we are, Your Honor, is we have a  
14 very strict Protective Order in this case. The Protective  
15 Order applies to third parties. Stexar did offer for a more  
16 limited -- much more limited restriction for one in-house  
17 counsel and two outside counsel to have access to their  
18 documents, but to be frank given the complexity of the case,  
19 given the Protective Order that is already in place, given  
20 that other third parties, such as Hewlett Packard, and  
21 Phillips, for example, have already produced documents under  
22 this Protective Order and that we are currently negotiating,  
23 for example, with people like Motorola and Texas Instruments  
24 to produce documents under this Protective Order, it would  
25 cause, I think, havoc and chaos in the litigation for us to

1 start amending or changing the Protective Order for Stexar,  
2 especially when this Protective Order seems to be good enough  
3 for a lot of major companies in the industry, including Intel,  
4 who obviously has a lot at risk here, albeit we're a party.  
5 But even, for example, Hewlett Packard who is not a party,  
6 Texas Instruments who is not a party, Phillips who is not a  
7 party. Motorola has asked for additional protections under  
8 the Protective Order, and we are negotiating that with them.

9 THE COURT: Well, maybe I'm confused. What is the  
10 volume of the redacted documents?

11 MR. HEALEY: I think it's attached to the Motion.

12 THE COURT: Is it the 45 pages as set forth in this?

13 MR. GONSOULIN: Yes, Your Honor.

14 THE COURT: Okay. Well, let's hear from Mr.  
15 Gonsoulin here about why it is that this -- I mean, the  
16 examples he's given me are a little hard for me to conjure up  
17 in my mind the objection which you are making, Counsel. So,  
18 go ahead, Mr. Gonsoulin.

19 MR. GONSOULIN: May it please the Court. Your  
20 Honor, we represent Stexar, which is a non-party to this  
21 lawsuit.

22 Secondly, Stexar is a competitor of Intel.

23 Now, those are two very important things.

24 Thirdly, the information sought by Intel is not  
25 relevant to any issue in this lawsuit that we can determine.

1 I would like to point out -- Mr. Healey has pointed out  
2 letters and said, well, you know, March of 2005. I should  
3 like to point out, Your Honor, first of all, that unlike  
4 Hewlett Packard that has existed for a number of years,  
5 Motorola which has existed, Stexar was not organized until  
6 March of 2004. This lawsuit was filed in March of 2004. Now,  
7 I would like to point out -- I think that is very significant,  
8 Your Honor.

9 And the correspondence -- if you'll look in the 45  
10 pages, you will see that the correspondence ranges from June 1  
11 of 2004 to maybe April of 2005, long after any alleged patent  
12 infringement took place what have you. Our company was just  
13 getting started in 2004.

14 So, Your Honor, I don't see how anything that we  
15 have would be relevant to this lawsuit. And Intel has not  
16 shown any necessity for this information.

17 Their subpoena, Your Honor, is overly broad and  
18 global because it is not limited in time, it's not limited to  
19 a specific subject matter, and they have not shown any  
20 necessity. In fact, some of the information that they have  
21 requested has already been produced, as I understand it, by  
22 MicroUnity, some of the correspondence. So, they have already  
23 gotten some of this information, Your Honor.

24 But the thing about it, Your Honor, as you will see  
25 in the affidavit of Richard Calderwood, who is the general

1 counsel for my client, Stexar, the information that has been  
2 redacted -- and let me point out, that we've submitted 45  
3 pages of documents, that's all that we believe is responsive  
4 to their subpoena. We -- some of those are completely  
5 unredacted, some of them are partially redacted, some of them  
6 are fully redacted. As Mr. Calderwood pointed out, the names  
7 of our clients, officers, directors, partners, business  
8 partners, the product space, where we are focusing, strategic  
9 business places, that is all trade secret. And that is  
10 something that the rules permit us to do it. Rule 45 that we  
11 just talked about a little earlier in the previous hearing  
12 says that you cannot require disclosure of trade secret  
13 information or confidential information, and that is exactly  
14 what we are asking this Court, is that we want no disclosure.  
15 But rather than just stonewalling it, Your Honor, we submitted  
16 45 pages of redacted documents. We also made an offer for one  
17 outside counsel and, I believe, one inside counsel to look at  
18 these things -- these documents, unredacted, and show us what  
19 -- why this information that has been redacted is relevant to  
20 this lawsuit. And they have refused that offer, Your Honor.  
21 We feel that we have gone well beyond what we are required to  
22 do under the Federal rules, and therefore we object to this  
23 Motion to Compel.

24           If, as an alternative, we have said that if they  
25 cannot convince us that this information is relevant, we would

1 like to submit this information unredacted to the Court for an  
2 in-camera inspection. But, Your Honor, who our partners are,  
3 who our -- the names of our employees, where we are going as  
4 far as the marketplace is concerned, and we're just a young  
5 company, Your Honor, it is very important that all of this  
6 information be concealed as trade secret. It is business  
7 communications, and it's just very, very important that this  
8 not be given to Intel, Your Honor, or to any of their experts.

9 THE COURT: All right. Mr. Gonsoulin, under your  
10 theory of trade secrets, then we could just take people that  
11 had a lot of knowledge about things and just hide them out  
12 forever and not disclose them, you know. That's a little  
13 contrary to what's been going on in this District for a number  
14 of years. I'm just saying that you're saying that employees  
15 that have relevant knowledge, do not have to be disclosed  
16 because that would somehow -- that would tell them something  
17 about it. That is a little foreign to the Court under the  
18 present practice as I understand it.

19 MR. GONSOULIN: Well, Your Honor, let me say this:  
20 Some of these employees have knowledge, but -- as to where we  
21 intend to go, where our client intends to go, that has nothing  
22 to do with Intel.

23 THE COURT: Well, I know, but you're wanting to  
24 stretch it to the point that you don't even have to tell them  
25 their names. I haven't said that they have to give up

1 everything they know yet, but what you're wanting to do is  
2 say, they can't even know who the potential witness is.

3 MR. GONSOULIN: Well, Your Honor, we think that some  
4 of those witnesses have knowledge that they -- if they know  
5 the name, they can -- Intel can know where we are going, Your  
6 Honor.

7 THE COURT: Well, that's a little foreign to me.  
8 Mr. Healey, are y'all not even going to look at these  
9 documents? You want me to try to figure it out without some  
10 help?

11 MR. HEALEY: Your Honor, we would be happy to look  
12 at them and give you some help. I can -- these are a couple  
13 of pages that are in the record that I can show you just to  
14 make the point, just from the redactions you can see what I'm  
15 talking about. If I could approach?

16 THE COURT: Yes.

17 MR. HEALEY: If you look, here is the one I  
18 mentioned earlier where we are talking about somebody who has  
19 draft patent license agreements and he's the gatekeeper, you  
20 know, clearly we are entitled to know who that is.

21 Here is one -- if you look at the -- an e-mail from  
22 Darrell Boggs and it is blanked out a bunch of stuff about  
23 group floating point operations and whether they -- and it  
24 says, they don't directly read on blank.

25 The whole subject matter of this lawsuit is whether

1 MicroUnity's group floating point operations technology reads  
2 on certain things at Intel microprocessors. That's the  
3 subject matter of the lawsuit.

4           So, what we have are -- and they have only produced  
5 45 pages because we sent them a very narrowly tailored  
6 subpoena, we are not asking them for more documents. We are  
7 not saying give us more stuff. We will keep the 45 pages,  
8 we're just saying fill in all of these blanks so that we can  
9 pursue it.

10           Now, if it would be of assistance to the Court for  
11 two outside counsel and one inside counsel to go through this  
12 and us to supplement the record with a letter or a brief under  
13 seal, I'll happily do that. Our problem, of course, Your  
14 Honor, is we've got thousands of pages from Hewlett Packard,  
15 and pages from Phillips and Texas Instruments and other  
16 companies, and it seemed to us where it was so clear that this  
17 information from Stexar was not entitled to be redacted, that  
18 Stexar ought to produce the information, identify these  
19 people, have it handled under the Protective Order as the  
20 information from other technology companies in this space, as  
21 opposed to create a precedent where some subset of lawyers has  
22 to go through the productions of technology companies that we  
23 have got to deal with.

24           THE COURT: Well, I'm faced with a sworn affidavit  
25 that says it's going to damage them, you know, and I don't

1 really have anything that sort of --

2 MR. HEALEY: Well, I would --

3 THE COURT: -- and I have some serious question  
4 about it, the breadth of it. So, in order for me to feel  
5 comfortable in ruling contrary to what's in this sworn  
6 affidavit from general counsel of Mr. Gonsoulin's client, I  
7 want -- I'm going to take you up and have you submit that.

8 MR. HEALEY: We'll do it, sir.

9 THE COURT: Now, there is no disagreement about two  
10 outside counsel and one inside counsel looking at it, is that  
11 right, Mr. Gonsoulin?

12 MR. GONSOULIN: That's correct, Your Honor. But  
13 with the understanding that they would not disclose it either  
14 to Intel or to any technical experts, Your Honor.

15 THE COURT: Well, it is limited -- it is limited to  
16 them, they will not disclose it to any other person without  
17 further order of this Court.

18 MR. HEALEY: Yes, sir. Now, I take it that support  
19 staff is exempted, so that we can put it in a letter and send  
20 it to you.

21 THE COURT: Well, how much time -- yes, I think the  
22 Court and its staff is always exempted.

23 MR. HEALEY: Yes. As well as my secretary and  
24 paralegal.

25 THE COURT: Well, yes, but you are going to protect



1 the --

2 MR. HEALEY: Yes, sir.

3 THE COURT: You are responsible for that.

4 MR. HEALEY: Absolutely.

5 THE COURT: How much time are you going to need to  
6 file a written brief.

7 MR. HEALEY: If we can get it, we'll file the brief  
8 under seal within a week of when we get the documents.

9 THE COURT: Well, you can get them to him by Monday,  
10 can't you, Counselor?

11 MR. GONSOULIN: Sir?

12 THE COURT: You can get them to him by Monday,  
13 today's Thursday. I'm sure Federal Express works over the  
14 weekend between wherever your client's got a copy -- you got a  
15 copy in your office?

16 MR. GONSOULIN: Yes, I have a copy.

17 THE COURT: Well, all right. Then all you have got  
18 to do is make a copy of 45 pages and get it over to Houston, I  
19 believe you can do that by Monday.

20 MR. GONSOULIN: Yes, sir.

21 THE COURT: To Mr. Healey's office.

22 MR. HEALEY: If we could say April (sic) 16th  
23 because I was going to take the 15th off.

24 THE COURT: April?

25 MR. HEALEY: I mean, August 16th. I'm sorry, Monday

1 is the 8th, right? So, the 15th is a week from Monday, so the  
2 16th, because I was going to take the 15th off.

3 THE COURT: Well, how about the 17th, Mr. Healey?

4 MR. HEALEY: Okay. Thank you.

5 THE COURT: I'm feeling so generous today, I got  
6 back at 10:00 o'clock last night from vacation, so I'm still  
7 in a good mood. So, I will give you an extra day.

8 MR. HEALEY: The 17th will work, Your Honor.

9 THE COURT: All right.

10 MR. GONSOULIN: Your Honor, let me understand what  
11 the Court's ruling is, would you repeat that for me and the  
12 dates.

13 THE COURT: All right. Monday at 5:00 o'clock --  
14 Monday, August 8th at 5:00 o'clock, you shall cause to be  
15 delivered to Mr. Healey's office an unredacted set of  
16 documents to be reviewed by one in-house counsel and two  
17 outside counsel. And that Mr. Healey, then, shall file a  
18 written brief, under seal, with his arguments to the Court by  
19 August the 17th at 5:00 o'clock why I should disregard the  
20 affidavit of your general counsel. And you may file within  
21 five days after the -- well, the Monday following the 17th,  
22 whatever -- that would be the 25th, I guess, no, the 22nd, any  
23 response. And then I will rule on it.

24 MR. GONSOULIN: Okay.

25 THE COURT: Okay? That take care of it? Anything

1 else that we need to take up today?

2 MR. HEALEY: No, sir.

3 THE COURT: All right. These are a little bit more  
4 micro-managed questions than I normally deal with.

5 MR. HEALEY: We try to avoid trouble.

6 THE COURT: I know.

7 (Discussion off the record.)

8 COURT SECURITY OFFICER: All rise.

9 (Court adjourned.)

10 \* \* \* \* \*

11

12

13 CERTIFICATION

14

15 I HEREBY CERTIFY that the foregoing is a true and  
16 correct transcript from the stenographic notes of the  
17 proceedings in the above-entitled matter to the best of my  
18 ability.

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SUSAN SIMMONS, CSR  
Official Court Reporter  
State of Texas No.: 267  
Expiration Date: 12/31/06

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8-10-05  
Date